

1 NEW JERSEY DEPARTMENT OF LABOR  
 2 AND WORKFORCE DEVELOPMENT  
 3 DIVISION OF WORKERS' COMPENSATION  
 4 CLAIM PETITION NO. 2005-16154

4 x-----x  
 5 LUIS ROSADO,  
 6 Petitioner, DECISION ON MOTION  
 7 -v-  
 8 CRESCENZI AND SON Monday,  
 9 CONCRETE, INC., January 9, 2006  
 10 Respondent.  
 11 x-----x

12 B E F O R E: THE HONORABLE ROBERT F. BUTLER  
 13 JUDGE OF COMPENSATION

14 A P P E A R A N C E S:

15 LAW OFFICES OF SCOTT J. LEWIS  
 16 BY: SCOTT J. LEWIS, ESQ.  
 17 71 Cooper Street  
 18 Woodbury, New Jersey 08096  
 19 Attorney for the Petitioner

20 FREEMAN, BARTON, HUBER & SACKS  
 21 BY: RICHARD BARTON, ESQ.  
 22 20 Tanner Street  
 23 Haddonfield, New Jersey 08033  
 24 Attorneys for the Respondent

25 TERESA J.F. BAUTZ  
 Certified Shorthand Reporter  
 JerseyShore Reporting, LLC

1 (The hearing commenced at  
2 approximately 1:52 p.m.)

3 THE COURT: This is the  
4 return day with respect to the matter of a  
5 motion for temporary and medical benefits  
6 filed on behalf of the petitioner, Luis  
7 Rosado, in Claim Petition No. 2005-16154 in  
8 which the respondent is Crescenzi and Son  
9 Concrete, Inc. Would you note your  
10 appearances.

11 MR. LEWIS: Thank you,  
12 your Honor. Scott J. Lewis representing the  
13 petitioner.

14 MR. BARTON: Richard  
15 Barton for the respondent, Crescenzi and Son  
16 Concrete.

17 THE COURT: Gentlemen,  
18 both parties have rested in this matter, and  
19 the proofs are now concluded. I indicated to  
20 counsel that I would be in a position to  
21 render my decision today.

22 My decision is as follows:  
23 There is but one issue for this Court to  
24 decide in this matter. That issue regards  
25 the petitioner's relationship with the

1       respondent at the time of his accident. Was  
2       he an independent contractor or was he an  
3       employee of the respondent?

4                       This matter comes before  
5       this Court based upon an emergent motion  
6       filed on behalf of the petitioner. In that  
7       motion that was filed with this division on  
8       September 23rd, 2005, the petitioner sought  
9       both medical treatment and temporary  
10      disability benefits that were associated with  
11      what he alleged to be a work-related accident  
12      that occurred on March 16, 2005.

13                     In both the petitioner's  
14      motion and underlying claim petition he  
15      alleges that his accident occurred while he  
16      was employed by and working for the  
17      respondent at a job site in the state of  
18      Pennsylvania. His accident and resulting  
19      injuries occurred when he fell through the  
20      roof to a concrete floor in a building that  
21      was being demolished by his alleged employer.  
22      His injuries were quite serious.

23                     In fact, this motion was  
24      peremptorily scheduled by the Court for  
25      December the 1st, 2005 because he had already

1       been scheduled to undergo major back surgery  
2       within the week that followed. When this  
3       trial began on December 1st, 2005 the  
4       respondent denied that the petitioner was in  
5       its employ on the date of the accident and  
6       left the petitioner to his proofs as to all  
7       issues. Medical proofs were not presented  
8       because compensability was the only issue to  
9       be litigated.

10                               The petitioner and Joseph  
11       A. Crescenzi, the president of the  
12       respondent, were the only witnesses to  
13       testify. Despite the respondent's denial of  
14       an employment relationship, none of the facts  
  
15       that are significant to the Court's  
16       determination and that were supplied by the  
17       petitioner during his testimony were disputed  
18       by Mr. Crescenzi.

19                               The only fact supplied by  
20       the petitioner's testimony that was disputed  
21       by Mr. Crescenzi and to which he apparently  
22       attached importance dealt with the reason why  
23       the petitioner was being paid by cash rather  
24       than by the respondent's company check for  
25       his services at the job site. The petitioner

1 testified that for a period of time ending  
2 approximately one year before this accident,  
3 the petitioner had paid him on a weekly basis  
4 for his services with a company check.  
5 Thereafter, Mr. Crescenzi would pay him  
6 weekly by cash.

7                               The petitioner testified  
8 that this change in the method of payment  
9 from check to cash was Mr. Crescenzi's  
10 decision. He also testified that Mr.  
11 Crescenzi advised him that this change was  
12 necessary because "...he was having problems  
13 with his insurance...".

14                              Mr. Crescenzi's  
15 explanation for the change in the  
16 petitioner's method of payment was somewhat  
17 different. He testified that it occurred not  
18 as a result of his decision but rather  
19 because of the petitioner's request to do so.  
20 He testified that the petitioner did not wish  
21 to be paid "...on the books..." because he  
22 owed back child support.

23                              Although a review of Mr.  
24 Crescenzi's testimony clearly indicates that  
25 he attached great significance to the reason

1       for the change in the nature of the  
2       petitioner's compensation for his services to  
3       the respondent, this Court does not. The  
4       truly significant facts and factors that  
5       control this Court's decision as to whether  
6       the petitioner's status at the time of the  
7       accident was that of an independent  
8       contractor or an employee of the respondent  
9       are those referenced in the case of Auletta  
10      versus Bergen Center For Child Development,  
11      338 NJ Super 464 (App. Div. 2001).

12                               The Auletta case  
13      reiterates the fact that the workers'  
14      compensation courts in this state rely upon  
15      two well-established tests to distinguish an  
16      employment relationship from that of an  
17      independent contractor. One, the "right to  
18      control" test, and two, the "relative nature  
19      of the work" test.

20                            "Under the control test  
21      the actual exercise of control is not as  
22      determinative as the right of control  
23      itself... because, in many instances, the  
24      expertise of an employee precludes an  
25      employer from giving him any effective

1 direction concerning the method he selects in  
2 carrying out his duties." Smith versus ETL  
3 Enterprises, 155 NJ Super 343 (App. Div.  
4 1978).

5 "The determination depends  
6 upon whether the employer had 'the right to  
7 direct the manner in which the business or  
8 work shall be done, as well as the results  
9 accomplished." Kertesz versus Korsh, 296 NJ  
10 Super 146 (App. Div. 1996).

11 Under the "relative nature  
12 of the work test" a court must determine,  
13 first, whether the work performed by the  
14 petitioner was an integral part of the  
15 regular business of the defendant; and two,  
16 whether the petitioner demonstrated  
17 "substantial economic dependence" upon the  
18 employer. Sloan versus Luyando, 305 NJ Super  
19 140 (App. Div. 1997). If this type of  
20 relationship existed, then the petitioner has  
21 established that he was an employee.

22 In applying these tests to  
23 the facts of this case or any other case,  
24 this Court is mindful of the language of the  
25 case of Santos versus Standard Havens, Inc.,

1       225 NJ Super 16, 54 Atlantic 2nd 708 (App.  
2       Div. 1988).

3                       "The term 'employee' is to  
4       be defined liberally in order to bring as  
5       many cases as possible within the scope of  
6       the Workers' Compensation Act so that the  
7       cost of industrial accidents may be passed  
8       along as part of the cost of the product or  
9       service provided." Santos versus Standard  
10      Havens Inc. Super.

11                      This Court finds that  
12      regardless of which test is applied to the  
13      facts of this case, the conclusion remains  
14      the same. The petitioner's accident  
15      unquestionably arose out of and in the course  
16      of his employment with the respondent. I do  
17      so for the following reasons: As to the  
18      "relative nature of the work test," the first  
19      element to be addressed is the question of  
20      whether the petitioner's work was an integral  
21      part of the respondent's business. The  
22      nature of the respondent's business was  
23      described by the petitioner during his  
24      testimony as being consistent with the name  
25      of the corporation; concrete installation.



1                                Nothing could be more of  
2        an integral part of the respondent's business  
3        than the work performed by the petitioner  
4        prior to the job in question even after the  
5        method of payment changed to cash. His job  
6        was pouring and surfacing concrete. That is  
7        what he did when he was paid by the  
8        respondent for his services at the Aberdeen,  
9        Maryland Air Force base, the Dover, Delaware  
10       Air Force base and the NASA Museum in  
11       Virginia.

12                              The uncontradicted proofs  
13        also establish the petitioner's "substantial  
14        economic dependence" upon the respondent.  
15        Both at the time of the accident and for the  
16        two and a half years that predate that  
17        accident the petitioner was employed by no  
18        one but the respondent. Never during that  
19        time frame was he ever self-employed. The  
20        respondent was his sole source of income.

21                              When the "right to  
22        control" test is applied to the petitioner's  
23        activities, the results remain the same... an  
24        employment relationship unquestionably  
25        exists. Once again, the proofs that lead to

1       this conclusion are uncontradicted. Mr.  
2       Crescenzi testified that not only did he  
3       personally transport the petitioner to and  
4       from the job site each day in the  
5       respondent's company vehicle, but it was he  
6       who totally controlled the petitioner's work  
7       activities. He told him what to do, where to  
8       do it and when to do it. He also testified  
9       that all of the tools used by the petitioner  
10      in performing his job belonged to the  
11      respondent.

12                               Although the demolition  
13      work undertaken by the respondent and  
14      performed by the petitioner on the date of  
15      the accident is totally different from their  
16      usual concrete work, the existence of the  
17      employment relationship continued  
18      nonetheless.

19                               Finally, this Court notes  
20      that Mr. Crescenzi conceded during his  
21      testimony that an employment relationship did  
22      exist between the petitioner and the  
23      respondent prior to the commencement of the  
24      respondent's cash payments to the petitioner.  
25      He testified that "Lou was on the books" and

1 withholding and deductions were taken from  
2 his check.

3 The best evidence  
4 presented during the trial that this  
5 employment relationship survived up to and  
6 including the date of the accident was  
7 provided by Mr. Crescenzi. When asked what  
8 if anything concerning the relationship  
9 between the respondent and the petitioner  
10 changed after the cash payments began, his  
11 response was that nothing changed. He still  
12 transported the petitioner to and from work,  
13 the petitioner continued to use the tools  
14 furnished by the respondent and the  
15 petitioner's activities were still directed  
16 and controlled by him.

17 Based upon a review of all  
18 the evidence presented, this Court finds that  
19 this petitioner's accident and resulting  
20 injuries arose out of and in the course of  
21 the petitioner's employment with the  
22 respondent.

23 Before reassigning this  
24 matter for the purpose of determining the  
25 temporary disability benefits and medical

1 treatment for which the respondent shall be  
2 liable, this Court feels compelled to address  
3 another issue. Having thoroughly reviewed  
4 all the evidence and facts presented by both  
5 parties during the course of this trial, it  
6 has become abundantly clear to this Court  
7 that the respondent has failed to produce a  
8 scintilla of evidence to support its  
9 contention that the petitioner was an  
10 independent contractor and that it was  
11 responsible for neither the petitioner's much  
12 needed medical treatment nor his temporary  
13 disability benefits.

14 In so doing it has forced  
15 the petitioner to languish without the  
16 benefit of the more than nine months of  
17 temporary disability benefits to which he is  
18 apparently entitled. More than eight months  
19 elapsed between the occurrence of the  
20 petitioner's accident and the commencement of  
21 this trial. That certainly constitutes more  
22 than sufficient time to conduct an  
23 investigation of the facts that might support  
24 or erode the defense to this motion that it  
25 has asserted.

1                               This Court has no  
2       knowledge as to what if any information the  
3       respondent may have obtained during that  
4       time. The Court is aware, however, that the  
5       respondent did continue to deny benefits to  
6       this petitioner and to compel him to commence  
7       this trial while it was totally without a  
8       factual or legal basis for doing so. I find  
9       such conduct to be unconscionable, and I can  
10      assure both parties that this Court will be  
11      mindful of this at the time of assessment of  
12      counsel fees and costs at the conclusion of  
13      the final stages of this motion as well as at  
14      the time of the assessment of the nature and  
15      extent of the petitioner's causally-related  
16      permanent disability.

17                            I assess a stenographic  
18      fee for the two days of trial as well as  
19      today's proceedings of \$450 payable by the  
20      respondent. I direct Mr. Lewis to prepare  
21      for my signature today a form of order  
22      embodying the terms of this decision.

23                            This matter will be  
24      relisted in one cycle. The parties in the  
25      meantime should be able to determine the

1     precise amount of temporary disability  
2     benefits to which the petitioner is entitled  
3     as well as to compile a list of medical bills  
4     and providers for which this respondent is  
5     liable.

6                     If those matters are  
7     resolved, the form of order incorporating  
8     those terms may be presented to me in one  
9     cycle for my signature and assessment of  
10    counsel fees and costs.  If those are not  
11    finalized by that time, the parties should be  
12    prepared to proceed in one cycle with proofs  
13    as to the matters that remain in dispute.

14                    This matter will be  
15    relisted for one cycle on January 30th, 2005  
16    at 1:30 p.m.  Okay.

17                    MR. LEWIS:  Thank you,  
18    your Honor.

19                    MR. BARTON:  Thank you.

20                    (The hearing concluded at  
21    approximately 2:07 p.m.)

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